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NO. 59389-7-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

KEVIN DEAN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Kevin Dean was the general manager at Frontier Ford. He was convicted by a jury of Theft in the First Degree and Conspiracy to Commit Theft in the First Degree for participating with the comptroller in embezzling more than 1.2 million dollars from Frontier Ford.

On appeal, Dean claims that the trial court erred in denying a motion for new trial based on a claimed Brady violation because an accountant for the State did not provide documentation of a claimed income evasion scheme of the owner of the car dealership. However, that information could have been obtained by Dean, was not obviously exculpatory and does not actually establish that the owner was involved in the tax evasion scheme.

Dean also claims there was insufficient evidence that he was involved in the theft for a jury to find him guilty. However, his account at the dealership was the source of much of the embezzlement and he was shown to have regularly reviewed the account information when provided by employees.

In addition, Dean argues that the trial court erred in denying a motion for mistrial based upon a comment by a witness that suggested that Dean would have knowledge of certain activity. Since

the comment was striken and was not significant, it did not significantly implicate Dean's right to remain silent to merit a mistrial.

Finally, Dean claims that his sentence was constitutionally disproportionate given the sentence imposed to his co-defendant. Given that Dean and his co-defendant were not similarly situated, it did not violate equal protection.

II. ISSUES

1. Where an accountant retained by the State did not provide records from a business which were available to the defense and did not establish significant impeachment, did the trial court err in finding that there was no Brady violation meriting a new trial?
2. Did the trial court abuse its discretion in denying a motion for a new trial based upon the claimed newly discovered evidence?
3. Was there sufficient evidence to establish that the defendant participated in the theft from the dealership where he was the general manager?

4. Was a comment by a witness regarding the defendant's knowledge so significant as to violate Dean's right to remain silent?

5. Where a defendant and the co-defendant were convicted of different crimes and had differing roles did the different sentences result in an equal protection violation?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On December 20, 2002, Kevin Dean was charged with three counts of Theft in the First Degree and three counts of Money Laundering relating to thefts from Frontier Ford and Ron Rennebohm. CP 1-3.

Discovery and pretrial proceedings were extensive.

On November 10, 2004, the charges were amended to Theft in the First Degree, Conspiracy to Commit Theft in the First Degree, and Acquiring an Interest in Real Property Through a Pattern of Criminal Profiteering. CP 978-88. These were the charges on which Dean was tried.

On January 3, 2006, a little over three years after charges were filed, the case came to trial. 1/3/2006 RP 3.[1]

The State filed the fourth amended information that removed some of the findings relating to the criminal profiteering charge on Mr. Dean as well as part of the exceptional sentence factors. 978-88.

At trial the trial court found that there was insufficient evidence regarding Mr. Dean upon the criminal profiteering charge. That charge was dismissed. 1/31/06 RP 54.

The jury returned a verdict finding Mr. Dean guilty of Theft in the First Degree and Conspiracy to Commit Theft in the First Degree. CP 1030, 1031. Dean stipulated that crimes for which he was convicted were major economic offenses. CP 1032.

Following trial Dean raised a claim of failure of the State to provide exculpatory information. 5/19/2006 RP 5-6, 10. The parties briefed the matter in the trial court and the defense filed an extensive declaration providing the record from a civil action between the expert used at trial by the State and Frontier Ford. CP 4866-6896.

[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. There are transcripts of 38 pretrial hearings, 23 days of trial, and 5 post trial hearings.

On November 15, 2006, the trial court heard the motion for a new trial based upon the allegation that the State failed to provide exculpatory information. 11/15/06 RP 2-84.

The trial court denied the motion. CP 1278-80.

On December 11, 2006, Dean was sentenced by the trial court to an exceptional sentence of 30 months. CP 1283-94.

On January 2, 2007, Dean timely filed a notice of appeal. CP 1295-1307.

2. Summary of Significant Trial Testimony[2]

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP 130. Rennebohm had worked his way up in the car industry having dropped out of high school and worked his way up to a lot boy. 1/18/06 RP 121-2. Rennebohm was essentially financially illiterate however, and was unable to read a corporate financial statement. 1/18/06 RP 162, 1/19/06 RP 155. Rennebohm's wife testified he could not read a profit and loss statement. 1/17/06 RP 158. So, Rennebohm relied on the skills of others to run Frontier Ford and in the accountant to monitor the financial side of the business. 1/18/06 RP 163-4, 217.

[2] Given the volume of the transcripts, this summary is very brief of necessity. Further detailed references to the record are provided in the arguments sections below.

At the time Rennebohm purchased Frontier Ford, Lisa Mullen was in the bookkeeping department of the dealership and Rennebohm made her the comptroller. 1/18/06 RP 132. Kevin Dean was hired as the dealership's general manager in August of 1996. 1/18/06 RP 152. Richard Rekdahl is an accountant who was employed by Clothier and Head. 1/18/06 RP 217. Clothier and Head was Frontier Ford's accountant beginning in the early 1990's. 1/18/06 RP 217

Employees at Frontier Ford had accounts receivable which allowed draws on their salaries or loans from the dealership. 1/9/06 RP 91; 1/18/06 RP 172. The account balances were then deducted from subsequent salary. 1/21/06 RP 91.

Rennebohm hired a person to review the financial records at Frontier Ford. 1/19/06 RP 61-2. Rennebohm eventually replaced Kevin Dean with that person. 1/19/06 RP 66-7. A few days later, Rennebohm was given a package of information that he provided to his accountants that there suggested some inappropriate financial dealings. 1/19/06 RP 72. Shortly after, Mullen contacted Rennebohm upset. 1/19/06 CP 73-6. They met at a park in Mount Vernon. 1/19/06 RP 75. Mullen admitted to Rennebohm that she had stolen from him and that if he fired her, she could never pay him

back. 1/19/06 RP 76. Mullen also told Rennebohm that in addition to $60,000 that Dean owed them there was an additional $200,000 that Dean owed. 1/19/06 RP 76-7. After attending a meeting with his accountants including Rekdal, Rennebohm then went to the dealership and then reported the theft to Anacortes Police in June of 2002. 1/5/06 RP 71, 1/19/06 RP 78-9.

Shortly after investigating, Mullen called to Rekdal and told him that she had lost her integrity. 1/24/06 RP 56. Mullen then told Rekdal that if she didn't have a job, she couldn't pay it back. 1/24/06 RP 56. Rekdal traced activity in receivable accounts of Dean, Rennebohm and Mullen at Frontier Ford. 1/25/06 RP 40.

Rekdal described the different accounts and transactions in the accounts totaling the loss under the accounts as follows:

Dean "285" account	1/25/06 RP 60-87	$239,111
Mullen "010" account	1/25/06 RP 87-127	$167,620
Dean "998" account	1/25/06 RP 127-132	$276,552
Rennebohm "049" account	1/25/06 RP 153-154	$ 12,762
Rennebohm "1810" account	1/25/06 RP 154-162	$210,472
Balance Sheet	1/25/06 RP 163-172	$158,585
Income Statements	1/25/06 RP 173-179	$ 71,965
Checks not posted	1/25/06 RP 179-181	$ 73,465
Outstanding obligation	1/25/06 RP 181-183	$ 60,958

Much of the embezzlement involved Mullen using draws from accounts receivable of current and former employees, including her own, to purchase personal property. Most of the transactions were

done by Ms. Mullen personally but some were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. By accounting machinations, Ms. Mullen remove the debts reflected in accounts receivable by transferring funds from other accounts within Frontier Ford and then aging or writing off the receivables.

Frontier Ford's annual sales were about $80 million dollars, so the transactions went unnoticed for years. Rekdal testified the total discrepancies he located in the accounts at Frontier Ford totaled $1,271,130. 1/25/06 RP 181-2.

A witness testified that Dean and Mullen were romantically involved for some of the time while both were employed at Frontier Ford. 1/6/06 RP 151; 1/13/06 RP 47. Dean and Mullen also lived together for about two or three months in the summer of 1998. 1/13/06 RP 47-8. Two accounts receivable clerks testified that they gave the statements to Dean and Mullen every month. 1/6/06 RP 145, 1/12/06 RP 56-7. Two of the receivable accounts were in Dean's name. 1/6/06 RP 145. Shari Fry testified that every month Dean carefully looked at the accounts receivable like a credit card statement. 1/12/06 RP 56-7.

At trial Mullen testified claiming the transactions were done with Rennebohm's approval. 1/31/06 RP 120; 2/1/06 RP 42. Mullen

claimed that the intent was to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 160.

Kevin Dean did not testify at trial.

IV. ARGUMENT

1. The State did not fail to disclose material exculpatory evidence.

Dean claims that accountant Richard Rekdahl failed to disclose information to the prosecutor to provide to the defense about what defense claims was a tax evasion scheme by Rennebohm involving National Warranty Company/Payment Insured Plan (NWC/PIPI)[3]. Appellant's Opening Brief at page 11, CP 1220 (describing what NWC/PIPI stands for). Contrary to defense claims, that accountant was not aware of the exculpatory value in advance of trial, the defense was actually aware of the exculpatory value and the defense with reasonable diligence could have obtained the information.

i. Facts regarding claim.

[3] The reference to CP 1220 is to describe what the abbreviation NWC/PIPI means.

Three months following trial Dean raised a claim of failure of the State to provide exculpatory information. 5/19/2006 RP 5-6, 10. The parties briefed the matter in the trial court and to support the claim the defense filed an extensive declaration providing the record from a civil action between the expert used at trial by the State and Frontier Ford. CP 4866-6696.

The argument by Dean, as well as Mullen, was that there was a billing scheme regarding warranty contracts sold at Frontier Ford and that Rennebohm received funds as a result of that scheme which were not reported as income. Appellant's Opening Brief at page 11.

At trial, Lisa Mullen actually testified about the payment insured plan (PIP) that she claimed was used to create income from extended service policies on the vehicles that was unreported. 2/1/06 RP 27-8. She explained that the dealer inflated the cost of the plan and that the dealer was then either paid back in cash, or that the dealer is given a loan which is then paid back with the proceeds of the inflated price. 2/1/06 RP 27. Mullen claimed to have worked on the PIPI loans with Rennebohm and that Frontier Ford received no benefits. 2/1/06 RP 27. After attributing the conduct to Rennebohm, Mullen stated that the purpose of the process was tax evasion. 2/1/06 RP 28. On cross examination by the State, Mullen testified

that Rennebohm told her to divert PIPI income to his home. 2/1/06 RP 69-70. Mullen volunteered that the "PIPI thing is huge." 2/1/06 RP 70 (see also 2/2/06 RP 7 where Mullen attempts to explain the PIPI as a kickback). Then on examination by defense counsel for Dean, Mullen further explained the whole PIPI scheme. 2/2/06 RP 114-118. Mullen explained that it is inflating the price of the service contract and then the business that takes the service contract sends back a check called a pack which goes to the car dealer himself. 2/2/06 RP 117. Mullen claims to sum up the scheme as follows;

> Q. Why does it come back to him personally rather than Frontier Ford, since Frontier Ford sent the money in?
> A. Because that's how it is designed, designed to give the dealer cash, in large pleasure it is so we will continue selling that company's product rather than switch to any hundreds of other service contracts that we could sell.
> Q. What's wrong with that?
> A. He's getting income siphoned off the store. He is getting cash in his pockets. He is buying a house or motor home.
> Q Basically you are telling me Frontier Ford is sending in the original money, the money coming back is going personally into Mr. Rennebohm's pockets?
> A. That's what I'm telling you.

2/2/06 RP 118. At trial, the defense did not call any accountants. Such an expert could have explained the importance of the claimed NWC/PIPI scheme.

Following trial, the defense based the motion for Brady violation as well as the motion for a new trial on documents gathered after trial. The motion was based substantially on a Declaration of John Murphy (Lisa Mullen's trial counsel) dated September 12, 2006, in which he lists and attached 126 exhibits to support the motion. CP 4866-6696. Of those exhibits, exhibit 120 was the most significant basis for the motion.[4] That document is a transcript of a deposition taken by the attorney for Frontier Ford of Richard Rekdal regarding his dealings with Frontier Ford. CP 4867. This deposition was taken for the case between Frontier Ford and Clothier & Head on January 31, 2006. CP 4870-1. In the transcript, Rekdal explains when he first noted the issue of the NWC/PIPI reporting some time after June of 2002. CP 4866-6696 (Exhibit 120 at pages 154-6). In that deposition, Rekdal indicates he did not know why the loans involving PIPI were not on the books of Frontier Ford. CP 4866-6696 (Exhibit 120 at pages 155). Rekdal also goes on to explain that contrary to claims of defense on appeal, his belief as to the fact that money left Frontier Ford without the authorization of Rennebohm was not

[4] Because of the fact that this clerk's paper is more than 1,800 pages long, the State will reference to the exhibit number in the clerk's paper and where applicable, the transcript page number and line where applicable. Because of the voluminous nature of this document, Mr. Dean cited to that in the same manner.

necessarily changed as a result of the information he gathered after trial. CP 4866-6696 (Exhibit 120 at pages 246-7).

Also crucial to the defense case at the trial court and again on appeal is a declaration of Richard Rekdal regarding what he knew and when he knew it. Rekdal's declaration in response to the motion for a new trial was filed on October 20, 2006. CP 1262-75. On appeal, Dean jumps to significant assumptions that information was "suppressed" based upon representations made as to the content of that declaration. Appellant's Opening Brief at pages 14, 19. The State contends that the declaration shows that Rekdal was not aware of the extent of the claim of underreporting income on tax returns until after the trial. CP 1266 at paragraph 2, lines 3-4; CP 1267 at paragraph 1, lines 3-4.

In that declaration, Rekdal describes that he had obtained two schedules from NWC/PIPI from Rennebohm prior to trial. CP 1266. Those two schedules had about eight pages of summary activity between Frontier Ford and two other businesses of which only one was owned by Rennebohm. CP 1266. The schedules were obtained from NWC/PIPI. CP 1266. Based upon the schedules, Rekdal determined that some funds were not properly reported as income. CP 1266-7. However, Rekdal could not determine whether this was

error or oversight by Frontier Ford, or whether the lack of reporting was intentional. CP 1267. In late March of 2006, after the trial, Rekdal reviewed NWC/PIPI information obtained from that business by his attorney. CP 1267, 1273. Based upon the review of that information and with the information from the testimony from Lisa Mullen at trial, Rekdal indicated that he formed the opinion well after trial that there was the intent not to disclose income. CP 1267. Rekdal did not indicate in the deposition that he could actually determine whether Rennebohm was the person who actually formed the intent not to disclose the income. CP 4866-6696 (Exhibit 120 at page 247). In fact when asked he replied as follows:

> Q. Who did you hear say what in the criminal trial that's led you to this hesitancy?
> A. I don't have any hesitancy. Nobody – alls I'm saying, this money left Frontier Ford, okay, and it was my belief per Mr. Rennebohm that it was unauthorized.
> Q. Are you changing that belief today?
> A. Not necessarily.
> Q. What do you mean by not necessarily?
> A. Based on the information I have, that was my belief at the time and is probably my belief today. Best I can answer that question.

CP 4866-6696 (Exhibit 120 at page 247).

Rekdal goes on to explain in detail in the declaration how as a result of the embezzlement, Rennebohm would have incurred a tax

liability of more than $262,000. CP 1268. Furthermore, Rekdal explained that the tax liability he would have received would have been far greater than the tax liability he would have been avoiding. CP 1269 at paragraph 2. Finally, Rekdal indicates that his testimony would not change from that provided to the jury at the criminal trial. CP 1274 at paragraph 4.

The prosecutor provided a declaration that explained his awareness of issues relating to NWC/PIPI before trial. CP 1219-27. The prosecutor described that he had not received any documents relating to NWC/PIPI. CP 1220. Furthermore, defense had even questioned Ron Rennebohm about the NWC/PIPI during a deposition occurring in 2003. CP 1226.

On November 15, 2006, the trial court heard the motion for a new trial based upon the allegation that the State failed to provide exculpatory information. 11/15/06 RP 2-84.

The trial court denied the motion and provided a written ruling regarding the court's determination regarding the claimed Brady violation. CP 1278-80. The court found as follows:

> The defense cites to Brady v. Maryland, 373 U.S. 83 (1963), alleging that the State knew of exculpatory evidence and violated the Due Process rights of the defendants by failing to provide such information. First, having presided over this matter for

three years, this Court has seen no evidence of knowing failure to disclose. Second, the Court has faith in Mr. Sequine's integrity and observed his demeanor in trial and argument. Nothing was hidden from the defense. As I have noted in previous rulings, the State far exceeded its responsibility in providing discovery. This was an extraordinarily complicated case which was handled as well by both sides as it could have been.

Alternatively, the defense theorizes that if the failure to disclose was unknowing, Mr. Rekdal's allegedly hidden knowledge should be imputed to the State on the theory that Redkal was a state agent. No authority cited supports that proposition. Even if there were, the Court would be hard pressed to find that the evidence might have changed the outcome of the trial. There is no evidence of a Brady violation or anything closely approximating CrR 8.3 mismanagement by the prosecution. The information relied on in post-trial motions was available to both sides in advance of trial and, in the case of PIPI/NCW, probably better understood by the defense than the State. The motions to dismiss on these theories are DENIED.

CP 1279-80.

ii. Legal standards regarding Brady claim.

Due process requires the State to disclose "evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (*quoting* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). **There is no Brady violation, however, "if the defendant, using reasonable diligence, could have obtained the information" at issue.** In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

> **Moreover, evidence is "material" and therefore must be disclosed under *Brady* "only if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"** United States v. Bagley, 473 U.S. at 682; Benn, 134 Wn.2d at 916. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Benn, 134 Wn.2d at 916. **"A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of trial.'"** Id. (*quoting* Bagley, 473 U.S. at 678).

In re Personal Restraint of Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999)

Benn v. Lambert provides a three part test a defendant must prove to show a Brady violation.

> In Brady, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194. Supreme Court cases following Brady clearly established that the defendant must prove three elements in order to show a Brady violation. **First**, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. *See* United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). **Second**, the evidence must have been suppressed by the State, either willfully or inadvertently. *See* United States v. Agurs, 427 U.S.

97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). **Third**, prejudice must result from the failure to disclose the evidence. *See* Bagley, 473 U.S. at 678, 105 S.Ct. 3375.

Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial. *See* Bagley, 473 U.S. at 676, 105 S.Ct. 3375; Agurs, 427 U.S. at 111-12, 96 S.Ct. 2392. For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." Agurs, 427 U.S. at 112, 96 S.Ct. 2392. Moreover, we analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases. *See* Bagley, 473 U.S. at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.); *see also* United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir.1986) (analyzing collectively the prejudice resulting from the state's suppression of four different pieces of impeachment material).

Benn v. Lambert, 283 F.3d 1040, 1052-3, *rev. denied*, 537 U.S. 942, 123 S.Ct. 341, 154 L.Ed.2d 249 (9th Cir. 2002) (emphasis added)

iii. Argument Pertaining to Brady claim.

I. The information was not within the exclusive control of the State and with reasonable diligence could have been obtained by defense.

No Brady violation occurs if the defendant could have obtained the information himself through reasonable diligence.

State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004), *citing* In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

In In re Personal Restraint of Benn, the defendant made a claim of a Brady violation for the State's failure to disclose a fire

marshal's report. In re Personal Restraint of Benn, 134 Wn.2d at 915-6. The State had provided a detective's report that summarized that the fire marshal's office had determined that a fire was most likely accidental. In re Personal Restraint of Benn, 134 Wn.2d at 916. The information could have been used to attempt to impeach a witness who claimed that the defendant had two men burn his trailer for insurance money. In re Personal Restraint of Benn, 134 Wn.2d at 918. The Court denied the Brady claim in part because the fire marshal's conclusion had been provided and more significantly because the defendant could have obtained the actual report. In re Personal Restraint of Benn, 134 Wn.2d at 918.

Similarly in the present case, the defense was aware of the issue of the NWC/PIPI schedules. During a deposition, defense had asked Mr. Rennebohm about those schedules. CP 1226. Defense counsel for Mr. Dean in fact presented testimony at trial from Ms. Mullen about those schedules. The unrebutted claim by Ms. Mullen's testimony was that Rennebohm was involved in a tax evasion scheme involving NWC/PIPI and that it was done at the direction of Mr. Rennebohm. 2/1/06 RP 27-8, 69-70, 2/2/06 RP 114-8. Despite the fact that the defense was aware of this claim and their allegation that it was "huge" defense made no attempt to actually gather the

schedules from NWC/PIPI prior to trial. In fact, defense did not retain an accountant who could have established the alleged importance of the claim prior to trial.

In the absence of the defense establishing why they could not have obtained this information prior to trial, this Court need not further evaluate the Brady claim. For the purposes of completeness, the State addresses the remaining tests under Brady.

II. The information was not favorable to the accused.

Evidence is favorable to the accused if it is exculpatory or impeaching. Strickler v. Greene, 527 U.S. 263, 281-2, 119 S.Ct. 1936, 144 L.Ed.2d 286(1999).

The State and defense have markedly different interpretations of the importance of the NWC/PIPI schedules.

Defense claims that this information indicated that Rennebohm was engaged in a tax evasion scheme and that it would corroborate Ms. Mullen's testimony. This is based upon the claim that they believe Rekdal "could no longer say that it was unauthorized." Appellant's Opening Brief at page 10. Thus, the defense claims the information impeaches Rennebohm.

From the State's perspective this claim is at best a slight change in opinion of Rekdal and not significant impeachment.

The State contends that the NWC/PIPI schedules reviewed by Rekdal did not have any exculpatory value. It was Ms. Mullen's testimony at trial upon which Rekdal was basing his skepticism about whether the claimed tax evasion was "intentional." CP 1267. And further when reviewing Rekdal's deposition carefully, you find that he did not vary his opinion from that presented at trial. CP 4866-6696 (Exhibit 120 at pages 246-7). Finally, Mr. Rekdal presented a deposition in which he indicated that his testimony would not have deviated from that presented at trial. CP 1274.

Against these significant backdrops of different interpretations, this Court should remember that this claim applies to what was a collateral matter. Defense is trying to establish some impeachment of Rennebohm by claiming that he was involved in a tax evasion scheme in one part of the business and therefore he was authorizing the defendants to take excessive pay in another part of the business.

Even if you assume the defense claim that Rennebohm was authorizing the NWC/PIPI that does nothing to establish that Rennebohm was also willing to have Ms. Mullen and Mr. Dean obtain almost $1.2 million dollars out of the business over the course of 4

years in addition to other salary earned. As Rekdal explained in his deposition that this scheme makes no sense because Rekdahl would have caused a tax liability as a result of the embezzlement which far exceeded the tax benefit from the claimed tax evasion scheme with NWC/PIPI. CP 1268-9.

III. The information was not suppressed.

Of the three types of situations where a Brady claim might arise, the present claim falls within the third category where the claim is that the government "failed to volunteer exculpatory evidence never requested, or requested only in a general way." Kyles v. Whitley, 514 U.S. at 534. To have a "suppression" in this context, the government must be aware of the exculpatory nature of the evidence in order to be able to realize that it needs to be disclosed.

> While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." In re Imbler, 60 Cal.2d 554, 569, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 14 (1963). And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706.

U.S. v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Dean summarily concludes that the information was "withheld" information. In fact what Rekdal indicated was that the only documents obtained from NWC/PIPI were eight pages of schedules which were used to prepare Rennebohm's tax return. CP 1266. He did not provide the information but could not determine whether the non-reporting of the income was intentional or by oversight. CP 1267. It was an opinion after reviewing trial transcripts, where he determined that the non-reporting was intentional. CP 1267. He did not have the information to form the opinion before trial and only came to evaluate the NWC/PIPI after having reviewed further information from subpoenas obtained by Rekdal's own counsel well after the trial here. CP 1267, 1274.

Information was not suppressed because Rekdal was unaware that the evidence had any potentially exculpatory value until after trial. Furthermore, Rekdal's opinion as to whether the NWC/PIPI billing practice was intentional was not formed until after trial when he became aware of transcripts in which Ms. Mullen indicated that the practice was intentional. CP 1267. Given that Rekdal was not aware of the potential value of the evidence and the

fact that he did not form an opinion until after trial, there was no "suppression" of material evidence.

IV. Dean has not shown prejudice.

> The prosecutor has a constitutional duty to disclose exculpatory matter to the defense. This duty is breached where the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt as to defendant's guilt that did not otherwise exist. State v. Campbell, 103 Wn.2d 1, 17, 691 P.2d 929 (1984), *cert. denied,* 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); State v. Vaster, 99 Wn.2d 44, 49, 659 P.2d 528 (1983).

State v. Bebb, 108 Wn.2d 515, 522-3, 740 P.2d 829 (1987). For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." United States v. Agurs, 427 U.S. at 112, 96 S.Ct. 2392.

In reviewing the evidence which was claimed to have been withheld, the evidence was not significant in the entire context of the record at trial. First, it is important to note that Dean's position at trial was that any theft that occurred was by Ms. Mullen and that he was not aware of the fact of what she was doing. 2/6/06 RP 99-100, 106-7. Dean claims that the evidence corroborated the defense case. Appellant's Opening Brief at pages 24-26. In fact, the claimed information does not show that Rennebohm knew he was

underreporting income. Since Rennebohm relied on others to handle his accounting, it is highly likely that the under-reporting of income by the NWC/PIPI scheme Rennebohm was not intentional. If it was not intentional it does not establish that Rennebohm was a crook as Dean claims.[5]

Dean also claims that the evidence impeached Rennebohm. Appellant's Opening Brief at pages 27-30. He claims that the evidence would show that Rennebohm was aware and involved in the complex scheme. However, there is no information shown in the defendant's brief that establishes that it would have shown Rennebohm's knowledge. It is also just as possible that this could have been done by Mullen. Dean also cites to the fact that defense had admitted a transcript in which Rennebohm had admitted to signing a false note to protect a dealership from his wife in their property settlement. 1/18/06 RP 110-6. Dean claims that Rennebohm had shared with Rekdal the fact that Rennebhom knew the note was invalid. In fact, defense was able to admit at trial the fact that Rennebohm had testified under oath in a deposition that he had said that the note was a phony. 1/19/06 RP 116-7. Admission of

[5] Rekdal's deposition indicates that when Rennebohm became aware of the under-reporting of income by the NWC/PIPI accounting, Rennebohm did include that

Rekdal's knowledge about whether Rennebohm thought the note was false would not have added anything significant because Rennebohm had already admitted to testifying that it was phony.

Dean also claims that Rennebohm implied that the cash flow problems at Frontier Ford were as a result of the theft and that Rekdal may have presented a different opinion after trial. Appellant's Opening Brief at page 30. Despite Dean's contention, the declaration of Rekdahl does indicate that the employee theft contributed to the financial situation at the dealership. CP 4866-6696 (Exhibit 86 at page 2, lines 7- 17). It does not show that Rekdal was "suppressing" this opinion about cash flow problems at Frontier Ford.

Finally, Dean claims that Rekdal's representation at trial that his basis for ending the relationship with Rennebohm was different than what he testified to at trial. Appellant's Opening Brief at page 31. Dean suggests that Rekdal's primary basis was actually Rennebhom's criminal acts and cites to a deposition for that purpose. In fact, the page of the deposition cited by Dean does not contain any reference to why Rennebohm ended his relationship with Rekdal. CP 4866-6696 (Exhibit 120 at page 285).

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within his income and amended his tax return to do so. CP 4866-6696 (Exhibit 120 at pages 289, 93-4.

It should be noted that all of these claimed bases are collateral to the fact of the theft from Frontier Ford proven at trial. Additionally, the trial court was in a similar position and determined that there was no prejudice.

> There is no evidence of a Brady violation or anything closely approximating CrR 8.3 mismanagement by the prosecution. The information relied on in post-trial motions was available to both sides in advance of trial and, in the case of PIPI/NCW, probably better understood by the defense than the State. The motions to dismiss on these theories are DENIED.

CP 1280.

V. The accountant was not part of the typical prosecution team.

Finally, the State believes that the fact that the entire basis for the alleged Brady violation is made regarding an accountant retained by the State is significant. The Brady requirement has typically extended to law enforcement.

In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the court indicated that the standard extends beyond just the prosecutor handling the case. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. at 437. Kyles

explained the purpose was because "the police investigators sometimes fail to inform a prosecutor of all they know" and that placing the burden on the prosecutor insures communication of relevant information. Kyles v. Whitley, 514 U.S. at 438. Kyles involved a case of nondisclosure by police. Numerous cases apply this standard to impute the knowledge of law enforcement to the prosecution or consider them part of the prosecution team. Strickler v. Greene, 527 U.S. 263, 116 S.Ct. 1936, 144 L.ed.2d 286 (1999), United States v. Zuno-Acre, 44. F.3d 1420 (9th Cir. 1995) *cert. denied*, 516 U.S. 945 (1995). Dean cites to no cases in which the Brady claim has extended to knowledge held by someone who was not prosecution or law enforcement.

The State contends extending this principal to a person who is not traditionally part of the prosecution team such as a private accountant is not an appropriate extension of the Brady doctrine. Extension to the accountant would not encourage the communication that Kyles encourages by making law enforcement part of the prosecution team.

2. The trial court did not err in denying a motion for new trial based upon "newly discovered evidence."

Dean also contends that the court erred in denying a motion for new trial. Appellant's Opening Brief at page 33-6. The factual basis for this motion is essentially the same basis as presented in the Brady claim explained above. Similarly, the trial court denied the claim. The trial court specifically found that "the evidence proffered would not probably change the outcome of the trial; that it could have been discovered with reasonable diligence before trial, and that the evidence, in any event, is essentially impeaching only." CP 1279.

> We review a trial court's denial of a motion for new trial for manifest abuse of discretion. State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991), *review denied,* 118 Wn.2d 1020, 827 P.2d 1012 (1992). Under CrR 7.5(a)(3), a court in its discretion may grant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected ... [by][n]ewly discovered evidence material for the defendant, which [he] could not have discovered with reasonable diligence and produced at the trial." If the newly discovered evidence is merely cumulative or impeaching or will not change the trial result, it does not justify granting a new trial. Hutcheson, 62 Wn. App. at 297, 813 P.2d 1283.
>
> A defendant must establish "that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of the five factors is grounds for the denial of a new proceeding. Williams, 96 Wn.2d at 223, 634 P.2d 868.

State v. Thach, 126 Wn. App. 297, 318, 106 P.3d 782 (2005).

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The same arguments made by the State in response to the Brady claim above apply in response to the motion for new trial under CrR 7.5.

One fact highlighted by the defense is that Rekdal never expressed any hesitancy that the taking of funds by Dean and Mullen was unauthorized. Appellant's Opening Brief at page 36. Dean then tries to claim that Rekdal's doubt expressed after trial would not have resulted in Dean being able to discover these doubts prior to trial. However, any doubts that Rekdal had were created after he reviewed the testimony of Ms. Mullen at trial. Thus, the doubts were not present prior to trial. Rekdal strongly indicates that his testimony would not have changed from that presented at trial. CP 1274. Rekdal supports this by explaining in his declaration that Rennebohm would not have agreed to the thefts engaged in by Dean and Mullen because the tax liability incurred would have far outweighed any tax liability he was avoiding. CP 1269. Rekdal summaries is evaluation of the financial impact on Rennebohm, Dean and Mullen.

> The bottom line here is that the only person harmed was Mr. Rennebohm. Mr. Dean and Ms. Mullen have received substantial sums of money tax free. It is important to note that they paid no taxes on any of the excess draw activity, and in fact, likely have significant outstanding tax liabilities to this day because of it.

CP 1269.

3. There was sufficient evidence that Kevin Dean conspired with Lisa Mullen to steal funds from Frontier Ford.

Dean's argument regarding sufficiency of the evidence is that since he was not shown to have actually done any of the accounting activity at the business and received no money in excess of what was owed to him by the dealership. However, the excess draw activity, Dean's apparent knowledge of the benefits being received by Mullen and his relationship with her establishes that he was a conspirator of the thefts from Frontier Ford.

> Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

> In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied,* 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn. App. at 728, 502 P.2d 1037.
>
> **Credibility determinations are for the trier of fact and are not subject to review.** State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). **We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.** State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied,* 119 Wn.2d 1011, 833 P.2d 386 (1992). **The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily.** State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied,* 98 Wn.2d 1004 (1982).

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

The testimony by Lisa Mullen was that the funds she obtained were at the direction of Rennebohm. Rennebohm denied that he had given her permission. Dean's claim was that he was both unaware of Mullen's activities and that his draws were a legitimate use of the pay mechanism that Frontier Ford used.

The evidence at trial shows a theft that Rennebohm came across which he reported to police that involved both Dean and Mullen. The accountant was able to trace the activity of Dean and Mullen. Their personal lives shared common interests including Mullen producing a letter falsely indicating that Dean had a large accrued pay balance to assist him in obtaining a loan. And, the employees of Frontier Ford established that Dean was aware of the transaction in his receivable account which was the basis for his accrued pay.

Rennebohm brought in Larry Stohrdal to go over all aspects of the business including the financial records. 1/19/06 RP 61. Mullen was not happy about it. 1/19/06 RP 61. Dean told Rennebohm that he didn't think Stordahl's review was necessary. 1/19/06 RP 62. Rennebohm decided to replace Dean with Stohrdahl in June of 2002. 1/19/06 RP 66-7. A few days later, Rennebohm was given a package of information that he provided to his accountants. 1/19/06 RP 72. Shortly after, Mullen contacted Rennebohm upset. 1/19/06 CP 73-6. They met at a park in Mount Vernon. 1/19/06 RP 75. Mullen admitted to Rennebohm that she has stolen from him and that if he fired her, she could never pay him back. 1/19/06 RP 76. Mullen also told Rennebohm that in addition to $60,000 that Dean owed

them there was an additional $200,000 that Dean owed. 1/19/06 RP 76-7. After attending a meeting with his accountants including Rekdal, Rennebohm then went to the dealership and then reported the theft to Anacortes Police. 1/19/06 RP 78-9.

Shortly after investigating, Mullen called to Rekdal and told him that she had lost her integrity. 1/24/06 RP 56. Mullen then told Rekdal that if she didn't have a job, she couldn't pay it back. 1/24/06 RP 56. Rekdal traced activity in receivable accounts of Dean, Rennebohm and Mullen at Frontier Ford. 1/25/06 RP 40. Rekdal located two accounts for Dean numbered 285 and 998. 1/25/06 RP 40, 66. Rekdal traced activity back to 1996. 1/25/06 RP 55. In the 285 account, numerous charges against the account for various apparent non-business purposes. 1/25/06 RP 62-3. A school where Kevin Dean's children attended even received money from the transactions. 1/25/06 RP 62. Transfers were made from the funds owed reflected in the 285 account to the 998 account as well as the cash account at Frontier Ford which reduced Dean's obligation in the 285 account. 1/25/06 RP 78-81, 92.

Transactions were also conducted by Lisa Mullen on the receivable account numbered 1810 assigned to Rennebohm. The total that left the company via this method was more than $210,000.

1/25/06 RP162. On January 5, 2006, Rekdal testified at length about the discrepancies located in the accounts at Frontier Ford. Those discrepancies are listed as follows:

Dean "285" account	1/25/06 RP 60-87	$239,111
Mullen "010" account	1/25/06 RP 87-127	$167,620
Dean "998" account	1/25/06 RP 127-132	$276,552
Rennebohm "049" account	1/25/06 RP 153-154	$ 12,762
Rennebohm "1810" account	1/25/06 RP 154-162	$210,472
Balance Sheet	1/25/06 RP 163-172	$158,585
Income Statements	1/25/06 RP 173-179	$ 71,965
Checks not posted	1/25/06 RP 179-181	$ 73,465
Outstanding obligation	1/25/06 RP 181-183	$ 60,958

Rekdal testified the total discrepancies he located in the accounts at Frontier Ford totaled $1,271,130. 1/25/06 RP 181-2.

Rekdal testified that Lisa Mullen's yearly salary ranged from $48,000 in 1996 to $76,000 in 2000, and that in the first five months of 2002, her salary was $37,000. 1/26/06 RP 66. Kevin Dean's salary ranged from $105,000 in 1997 to $265,000 in 2000. 1/26/06 RP 67.

Mullen testified she did the draws for Dean against his accrued pay. 2/1/06 RP 19-20, 36. Paycheck was supposed to wash out on a monthly basis, although Dean's never did. 1/6/06 RP 153, 1/18/06 RP 143.

Tonya Kniest, the account's receivable clerk, testified that employees had accounts receivable accounts to track debts including

draw checks. 1/6/06 RP 141. Kneist gave accounts receiveable statements to Dean and Mullen every month. 1/6/06 RP 145. Two of the receivable accounts were in Dean's name. 1/6/06 RP 145. Kneist described that Dean spent a lot of time in Mullen's office. 1/6/06 RP 146-7. It was open knowledge in the dealership that Mullen and Dean had a dating relationship. 1/6/06 RP 151. Dean and Lisa Mullen also lived together for about two or three months in the summer of 1998. 1/13/06 RP 47-8.

Shari Fry testified that she became aware of a large receivable account balance for Dean. 1/12/06 RP 55. Shari Fry testified that Dean looked at the accounts receivable like a credit card statement when it was opened up and looked at every month. 1/12/06 RP 56-7.

An employee of Washington Mutual Bank testified that Lisa Mullen signed a letter from Frontier Ford indicating that Dean had accrued payroll of over $60,000 and $198,000 in unpaid bonuses in May of 1999. 1/12/06 RP 148, 152, 156. In closing, Dean acknowledged that Dean lied to his bank about being owed $198,000 in order to secure a loan. 2/6/06 RP 92-3. In fact it was Lisa Mullen who had been the one who had directed the creation of the letter. 1/23/06 RP 77-9, 2/2/06 RP 132-3.

This evidence shows that there was a theft from Frontier Ford by Kevin Dean and Lisa Mullen. Lisa Mullen acknowledged the theft at the outset including Dean's obligation. With respect to Dean's claim that he lacked the knowledge that the thefts occurred, this evidence explained above is circumstantial evidence that Kevin Dean was well aware of the activity in his accounts receivable account since it was the basis for his income.

Thus, there was sufficient basis for a rational trier of fact to find the elements of both Theft in the First Degree and Conspiracy to Commit Theft in the First Degree for which Dean was charged.

4. The trial court did not abuse its discretion in denying the motion for mistrial as a result of the statement by the witness referring to the knowledge that Mullen and Dean would have.

Dean claims that a statement by Rekdal was a comment on his right to remain silent. Appellant's Opening Brief at page 5.

> At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); Miranda, 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda,* "[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the

> face of accusation." Miranda, 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

> A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard and the court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial judge is best suited to judge the prejudice of a statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The prosecutor was asking Rekdal about whether certain activity would be attributable to either Lisa Mullen or Kevin Dean. 1/27/06 RP 112-3. When asked if who would know actually who did the particular transactions, Rekdal responded by stating "you would have to talk to the two of them." 1/26/06 RP 113. Dean and Mullen both requested a mistrial. 1/26/06 RP 113, 4. The court chose to

strike the answer and the question and carried the case to the next morning to address the matter again. 1/26/06 RP 115-6.

> I tried to look at this bit of testimony from many different angles to assess what its impact would be on a trier of fact. I think really what it boils down to from my perspective is that there is just a different way of saying what has been said in trial many, many, shall I say ad nauseam, times, was that Ms. Mullen ran the computer system, ran the accounts, put things into the accounts. And from the court's perspective, there may not be -- well, I guess I don't have to say that much further.
>
> Was this an intentional egregious comment on a right to remain silent per Easter, which would clearly call for a mistrial? No. I think that there was, while an unfortunate question and perhaps an unnecessary question, I think that this was not nearly as strong a remark as I find in the cases cited by the defense and in another context. I mean it is just a different way of saying that the account holder would know things. I don't think in the great course of this trial one short answer to a short question really, I can only characterize it as a fleeting comment, not nearly as serious as the defense seems to think it is, that I think is minimally, if at all, prejudicial, and I think it can be cured with an instruction to disregard. So, the motion for mistrial will be denied, and the motion to dismiss for the cumulative effect is denied.

1/27/08 RP 28-9.[6]

The court directed the jury to disregard the question and answer which were presented. 1/27/06 RP 32.

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[6] Subsequent to the trial court's decision, Lisa Mullen chose to testify at trial. Kevin Dean did not testify but relied extensively on testimony of Lisa Mullen to attempt to establish that Kevin Dean was unaware of the thefts.

As held by the trial court, Rekdal's statement was an inartfully crafted response to the question asked. While pointing out that Kevin Dean and Lisa Mullen would have the basis for knowledge about the activity in the accounts would not have been impermissible, Rekdal's response about "asking them" might be interpreted as calling for a reponse. But as indicated by the trial court, the response was more directed to the fact that a person with the account would have knowledge about the account. Furthermore, the trial court struck the question and the response and instructed the jury to disregard the statements. A jury is presumed to follow the court's instructions. State v. Barajas, 143 Wn. App 24, 38, 177 P.3d 106 (2007).

Given that the jury is presumed to follow the court's instruction and the trial court determined that the comment was a fleeting one, the trial court did not abuse its discretion in denying the mistrial.

5. There was no equal protection violation in sentencing because the co-defendants were convicted of different crimes and received different sentences.

Finally, Dean claims that his sentence violates equal protection because he claims his exceptional sentence was disproportionately long to that received by his co-defendant Lisa Mullen.

Mullen was convicted of Theft in the First Degree, Conspiracy to Commit Theft in the First Degree and Criminal Profiteering. 2/7/06 RP 2. Her standard range was 12 months plus 1 day to 14 months. 12/11/06 RP 14. Mullen was sentenced to an exceptional sentence of 36 months. 12/11/06 RP 58. Dean was convicted of Theft in the First Degree and Conspiracy to Commit Theft in the First Degree. CP 1285-7. Dean's standard range was two to five months of jail time. 12/11/06 RP 13.

> Under the equal protection clause of the fourteenth amendment of the United States Constitution, and article I, section 12 of the Washington Constitution, "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Manussier, 129 Wn.2d 562, 672, 921 P.2d 473 (1006) (citation omitted). Where codefendants have received different sentences, a court will exercise equal protection analysis only after a defendant "can establish that he or she is similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances[.]" State v. Handley, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990) (an equal protection class of codefendants is established in the rare case where the co-defendants were at the scene of the offense and were charged with many of the same crimes). "Then, only if there is no rational basis for the differentiation among the various class members will a reviewing court find an equal protection violation." State v. Handley, 115 Wn.2d at 290, 796 P.2d 1266.

State v. Caffee, 117 Wn. App 470, 480, 68 P.3d 1078 (2002) *rev. denied* 149 Wn.2d 1023, *cert denied* 540 U.S. 1059 (2003).

As Caffee provides there are two primary tests to pass to determine whether there has been an equal protection violation. First, co-defendants convicted of the same crimes who were similarly situated by "virtue of near identical participation" must have received different sentences. And second, there must be no rational basis for differentiation between the co-defendants.

In examining the present situation, Dean does not meet the standards provided. Mullen was convicted of the additional charge of criminal profiteering and received a different sentence which was six months longer. Dean and Mullen were also not "similarly situated by virtue of near identical participation." Mullen was the individual who actually did the accounting machinations that provided the ability to accomplish and attempt to hide the thefts. Dean was the general manager, who the jury determined was aware of and participated in the thefts. Thus, they had different levels of culpability. That differing level of culpability results in a rational basis for the trial court to impose sentence on Dean. As the general manager, Dean was in the position of protection of the interests of Rennebohm. Instead of doing so, he allowed the transactions in his accounts and in sharing a relationship with Mullen received the benefits of his assistance with her. As such, there is a rational basis for sentencing them differently.

In State v. Clinton, 48 Wn. App. 671, 741 P.2d 52 (1987), two co-defendants pled guilty to the same offenses and were sentenced before different judges. Clinton had received an exceptional sentence of 9 years and the co-defendant received a standard range sentence. On appeal, the State conceded that there was no "real distinction between the roles of Clinton and Jones." State v. Clinton, 48 Wn. App. at 680. As opposed to the situation in Clinton, here there was a distinction between the roles of Dean and Mullen.

In State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990), Handley was not present at the location where the crimes occurred. Handley was convicted of fewer crimes but was the only co-defendant who received an exceptional sentence. The court held that because the roles differed significantly in the crimes, they were not similarly situated. State v. Handley, 115 Wn.2d at 291-2. As a result Handley determined that the co-defendants were not members of the same class. State v. Handley, 115 Wn.2d at 292. In addition, the court noted that there was a rational basis for differing sentences including the fact that Handley was an employee and friend of the victim.

Dean provides a comparison of the standard range sentences for both he and Mullen to support his proportionality analysis. None

of the case law presented by Dean support that type of analysis. How does one weigh by numbers the relative culpability of a general manager who assisted in a theft occurring on his watch compare to the person who accomplished the theft? The State contends this cannot be quantified in numbers and that there is a rational basis for the sentences imposed.

V. CONCLUSION

For the foregoing reasons, the conviction of Kevin Dean for Theft in the First Degree and Conspiracy to Commit Theft in the First Degree and the sentence imposed should be affirmed.

DATED this 5th day of September, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Gregory C. Link, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 5th day of September, 2008.

Karen R Wallace

KAREN R. WALLACE, DECLARANT

In re Skylstad
Wash.,2007.

Supreme Court of Washington,En Banc.
In the Matter of the Personal Restraint Petition of
Scott W. SKYLSTAD, Petitioner.
No. 78156-7.

Argued Nov. 28, 2006.
Decided July 19, 2007.

Background: After remand for resentencing, 118 Wash.App. 1062, 2003 WL 22293605, and after Court of Appeals' affirmance of sentence imposed at resentencing, 129 Wash.App. 1050, 2005 WL 2503117, defendant filed personal restraint petition (PRP). The Court of Appeals dismissed the petition. Review was granted.

Holding: The Supreme Court, Sanders, J., held that defendant's case did not have a final judgment when he filed his personal restraint petition, for purposes of statute providing that criminal defendants must bring collateral attacks against their judgment and sentence within one year of their judgment being final.

Remanded.

Fairhurst, J., filed a dissenting opinion, in which Madsen, Bridge, and Owens, JJ., concurred.

West Headnotes

[1] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
Statutory construction, like all questions of law, is reviewed de novo.

[2] Criminal Law 110 1586

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases
Criminal defendants can bring collateral attacks against their judgment and sentence, but must do so within one year of their judgment being final. West's RCWA 10.73.090.

[3] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
The court applies unambiguous statutes according to their plain language, and only ambiguous statutes will be construed.

[4] Statutes 361 205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Statutes 361 206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
The court must read a statute as a whole and give effect to all language used.

[5] Statutes 361 181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases
No construction of a statute should be accepted that has unlikely, absurd, or strained consequences.

[6] Criminal Law 110 1586

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases
A judgment is "final," for purposes of statute providing that criminal defendants must bring collateral attacks against their judgment and sentence within one year of their judgment being final, when review is terminated on both the conviction and the sentence. West's RCWA 10.73.090.

[7] Criminal Law 110 990.1

110 Criminal Law
110XXIII Judgment
110k990 Requisites and Sufficiency of Judgment
110k990.1 k. In General. Most Cited Cases
In criminal cases, the sentence is the judgment.

[8] Criminal Law 110 1190

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1190 k. Effect. Most Cited Cases
When an appellate court reverses a sentence it effectively vacates the judgment, because the final judgment in a criminal case means the sentence.

[9] Criminal Law 110 1586

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases
Petitioner's case did not have a final judgment when he filed his personal restraint petition (PRP), for purposes of statute providing that criminal defendants must bring collateral attacks against their judgment and sentence within one year of their judgment being final, where defendant had a pending direct appeal from the sentence imposed at resentencing, which resentencing was on remand after appellate court, in defendant's first direct appeal, had reversed the original sentence. West's RCWA 10.73.090.

**414 Jeffrey Erwin Ellis, Ellis Holmes & Witchley PLLC, Seattle, WA, for Petitioner.
Steven J. Tucker, Kevin Michael Korsmo, Spokane, WA, for Respondent.
Pamela Beth Loginsky, Washington Assoc of Prosecuting Atty., Olympia, WA, for Amicus Curiae on behalf of Washington Association of Prosecuting Attorneys.

SANDERS, J.
*945 ¶ 1 We are asked to determine whether a judgment is final if a defendant's sentence is still under appeal. RCW 10.73.090 prevents collateral attacks on a *946 judgment and sentence to be filed more than one year after the judgment becomes final. Scott Skylstad filed a personal restraint petition (PRP) during the second of two direct appeals, more than one year after his conviction but while his sentence was on appeal. Despite this ongoing second appeal, the Court of Appeals held Skylstad's PRP was time-barred.

¶ 2 We hold Skylstad's judgment was not final because his sentence was still being appealed. A judgment cannot be final until the conviction and the sentence are both final. Therefore, we remand to the Court of Appeals to determine the merits of

Skylstad's PRP.

I

FACTS

¶ 3 The relevant facts are undisputed although confusing. On February 8, 2002, Scott Skylstad was convicted in Spokane County Superior Court of first degree robbery with a firearm enhancement. He appealed the conviction, and the State cross-appealed the sentence. On October 7, 2003, the Court of Appeals, in an unpublished opinion, affirmed the conviction, but reversed the sentence. *State v. Skylstad*, noted at 118 Wash.App. 1062, 2003 WL 22293605, at *8, 2003 Wash.App. LEXIS 2952, at *18. We denied review on May 4, 2004, *State v. Skylstad*, 151 Wash.2d 1023, 91 P.3d 95 (2004), and the mandate from the first appeal issued on May 14, 2004.

¶ 4 The trial court resentenced Skylstad on July 28, 2004, and Skylstad appealed again. On October 11, 2005, the Court of Appeals affirmed Skylstad's sentence. On November 21, 2005, during the pendency of his second appeal, Skylstad filed a PRP. The Court of Appeals dismissed the PRP on December 15, 2005, finding it was time-barred and claiming the May 14, 2004 mandate issued in the first appeal was the date of final judgment. On September 6, 2006, we denied review of the opinion in the second direct appeal. *State v. Skylstad*, 157 Wash.2d 1023, 142 P.3d 609 ***947** (2006). Then on September 15, 2006, the Court of Appeals issued a final mandate in this case.[FN1]

FN1. Because this mandate was issued after we granted review of the PRP, Skylstad moved to supplement the record with the September 15, 2006 mandate. The State made no objection. Skylstad made a good faith effort to supplement the record promptly after the mandate was issued, and the mandate makes the record "sufficiently complete to permit a decision on the merits." RAP 9.10. We therefore grant Skylstad's motion to supplement the record with the September 15, 2006 mandate.

¶ 5 We granted discretionary review to determine whether there could be a final judgment before there was a final sentence.

**415 II

ANALYSIS

A. Can a Judgment Be Final if the Sentence Is Not?

[1][2][3][4][5] ¶ 6 Statutory construction, like all questions of law, is reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 807, 16 P.3d 583 (2001). Criminal defendants can bring collateral attacks against their judgment and sentence but must do so within one year of their judgment being final. Specifically, RCW 10.73.090 provides:

> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than *one year after the judgment becomes final* if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
>
> (3) For the purposes of this section, a judgment becomes final on the last of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
>
> ***948** (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090 (emphasis added). We apply

unambiguous statutes according to their plain language; only ambiguous statutes will be construed. *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994). When we read a statute, we must read it as a whole and give effect to all language used. *State v. Young*, 125 Wash.2d 688, 696, 888 P.2d 142 (1995). And no construction should be accepted that has "unlikely, absurd, or strained consequences." *State v. Elgin*, 118 Wash.2d 551, 555, 825 P.2d 314 (1992).

1. *RCW 10.73.090 plainly says a judgment is final when review is terminated on both the conviction and the sentence*

[6] ¶ 7RCW 10.73.090 is not ambiguous. A collateral attack on a judgment and sentence must be made within one year of the final judgment. A judgment is final when any of the requirements of RCW 10.73.090(3) are met. Depending on a defendant's course of action, each requirement of subsection (3) sets the final judgment date to when all litigation on the merits ends. After a defendant is convicted he has three options: he can accept the judgment and sentence, he can appeal to only our state courts, or he can appeal to our state courts, and then, if he loses, can seek review in the United States Supreme Court on a federal issue. If a defendant chooses not to appeal (or his time to appeal expires), judgment is final when the trial court clerk files the judgment. RCW 10.73.090(3)(a). This ends all litigation on the merits. Alternatively, if a defendant appeals, then the judgment is final when the appellate court issues its mandate "disposing of the direct appeal." ***949**RCW 10.73.090(3)(b). This terminates review [FN2] and similarly ends all litigation on the merits. Finally, if the defendant petitions the United States Supreme Court for certiorari, then the judgment becomes final when the United States Supreme Court denies his petition. RCW 10.73.090(3)(c). This also terminates review and ends litigation on the merits. Therefore, pursuant to RCW 10.73.090 a judgment becomes final when all litigation on the merits ends.

> FN2. A mandate is "written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review." RAP 12.5(a).

¶ 8 This comports with the plain meaning of "final." *Webster's Third New International Dictionary* gives many definitions of "final," but the one most apposite to a final ****416** legal judgment is: "being a judgment ... that eliminates the litigation between parties on the merits and leaves nothing for the inferior court to do in case of an affirmance except to execute the judgment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 851 (2002).[FN3] *Black's Law Dictionary* gives a similar definition for "final": "(Of a judgment at law) not requiring any further judicial action by the court that rendered judgment to determine the matter litigated; concluded," and for "final judgment": "A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Black' Law Dictionary 662, 859 (8th ed.2004).

> FN3. *Webster's Third New International Dictionary* gives its definition in the context of the United States Supreme Court, but the same would obviously apply to any high state court as well.

¶ 9 This is also how both this court and United States Supreme Court have defined final judgment. We have said, "[i]n a criminal proceeding, a final judgment 'ends the litigation, leaving nothing for the court to do but execute the judgment.' " *State v. Taylor*, 150 Wash.2d 599, 601-02, 80 P.3d 605 (2003) (quoting *In re Det. of Petersen*, 138 Wash.2d 70, 88, 980 P.2d 1204 (1999) (quotation marks omitted)); *see also* ***950***State v. Siglea*, 196 Wash. 283, 285, 82 P.2d 583 (1938) ("As a prerequisite to an appeal in a criminal case, there must be a final judgment terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination."). Similarly, the United States Supreme Court has said a final judgment " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)).

[7] ¶ 10 Here more needed to be done than simply executing the judgment-the superior court still had to determine Skylstad's sentence. In criminal cases, "[t]he sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) (stating a judgment cannot be final if the

sentence has been vacated); *see also* *State v. Harrison*, 148 Wash.2d 550, 561-62, 61 P.3d 1104 (2003) (stating after defendant's "sentence was reversed, ... the finality of the judgment is destroyed" and defendant's "prior sentence ceased to be a final judgment on the merits"); *Siglea*, 196 Wash. at 286, 82 P.2d 583 ("In a criminal case, it is the sentence that constitutes the judgment against the accused, and, hence, there can be no judgment against him until sentence is pronounced."). Similarly, final means "the imposition of the sentence." *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981) (per curiam); *see also* *Teague v. Lane*, 489 U.S. 288, 314 n. 2, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) ("[A] criminal judgment necessarily includes the sentence imposed upon the defendant."). Therefore, litigation on the merits continued and Skylstad's judgment could not be final until his sentence was final.

¶ 11 Under federal statutes similar to RCW 10.73.090, a judgment is not final until both the conviction and the ***951** sentence have been affirmed.[FN4] *Burton v. Stewart*, 549 U.S. 147, 127 S.Ct. 793, 798-99, 166 L.Ed.2d 628 (2007) (stating the statute of limitations for collateral review does not begin until both the conviction and the sentence became final). If a prisoner wishes to file a motion for habeas corpus review, he must do so within one year of his judgment becoming final. 28 U.S.C. §§ 2244, 2254, 2255. In *Burton*, the United States Supreme Court considered a Washington state case where Lonnie Burton was convicted of rape, robbery, and burglary. *Burton*, 127 S.Ct. at 793. Our Court of Appeals affirmed the conviction but remanded for resentencing. *Id.* (citing *State v. Burton*, noted at 86 Wash.App. 1046, 1997 WL 306429 (1997)). While review of his sentence was pending, Burton filed a petition under section 2254 for a writ of habeas corpus attacking his conviction. This was rejected, and four years later, Burton filed a subsequent petition for habeas corpus, this time ****417** attacking the sentence. The United States Supreme Court found this later petition to be a "second or successive" petition, which Burton had not obtained authorization to file. *Id.* Burton argued, however, he had to file the first petition before the sentence was final, otherwise he would have exhausted the one-year statute of limitations. The Court dismissed this argument, saying the judgment was not final until *both* the conviction and the sentence were final and *all* direct appeals were exhausted or the time for such appeals had expired:

> FN4. Obviously federal cases interpreting federal statutes are not dispositive of our interpretation of RCW 10.73.090. Nevertheless, their reasoning is both apposite and persuasive.

> But this argument misreads [the Antiterrorism and Effective Death Penalty Act], which states that the limitations period applicable to "a person in custody pursuant to the judgment of a State court" shall run from, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." [18 U.S.C.] § 2244(d)(1)(A). "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 ***952** (1937). Accordingly, Burton's limitations period did not begin *until both his conviction and sentence* "became final by the conclusion of direct review or the expiration of the time for seeking such review"-which occurred well *after* Burton filed his 1998 petition.
> *Id.* at 798-99 (first emphasis added).[FN5] Similarly, Skylstad's limitations period did not begin until both his conviction and sentence became final on September 15, 2006. Therefore, the May 14, 2004 mandate was not a final judgment since only the conviction-but not the sentence-was final.

> FN5. The result in Burton is neither surprising nor novel considering the near unanimity with which federal courts of appeals have found a judgment is both a conviction and a sentence. *United States v. Lafromboise*, 427 F.3d 680, 684, *amended by* 2005 U.S.App. LEXIS 26809 (9th Cir.2005) ("A contrary rule would result in 'multiple rounds of habeas review' as defendants would be forced to collaterally attack their convictions before the district court had reconsidered the sentence, and then later file a separate motion challenging the sentence."(quoting *United States v. Dodson*, 291 F.3d 268, 275 (4th Cir.2002))); *see also* *Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir.1993) ("A judgment is not final if the appellate court has remanded the

case to the lower court for further proceedings, unless the remand is for a purely 'ministerial' purpose, involving no discretion, such as recomputing prejudgment interest according to a set formula."). Similarly, in federal proceedings, if one of a defendant's predicate state convictions is invalidated, he may then file a section 2255 petition, and the one-year statute of limitations begins from when the defendant knew there was a "conclusive invalidation of a state conviction." *United States v. Venson*, 295 F.Supp.2d 630, 634 (E.D.Va.2003) ("This result is compelled by principles of fundamental fairness, as a meritorious challenge to a predicate state court conviction may take well in excess of one year to reach a final state resolution-a delay clearly not attributable to the defendant.").

2. *The State's reading of RCW 10.73.090 produces inconsistent and absurd results*

¶ 12 Considering the clarity with which both the United States Supreme Court and this court have held a criminal judgment cannot be final until both the conviction and the sentence are final, there should be little doubt as to how we would resolve this case. But the State focuses on language in RCW 10.73.090, stating a judgment is final when "an appellate court issues its mandate disposing of a timely direct appeal from the *conviction.*" RCW 10.73.090(3)(b) (emphasis added). Therefore, the State claims May 14, 2004-the date the conviction was final-was when the judgment ***953** was final, while Skylstad argues conviction, judgment, and sentence should be read interchangeably. Pet'r's Suppl. Br. at 9.

¶ 13 While conviction, judgment, and sentence certainly are not interchangeable, the State focuses solely on one word-conviction-rather than reading the sentence and the statute as a whole. *See State v. Young*, 125 Wash.2d 688, 696, 888 P.2d 142 (1995) (" 'Each provision must be viewed in relation to other provisions and harmonized if at all possible to insure proper construction of every provision.' " (quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wash.2d 503, 509, 730 P.2d 1327 (1986))). A "mandate disposing of a timely direct appeal from the conviction,"RCW 10.73.090(3)(b), means the mandate that terminates review of both conviction and sentence-only then can the appeal****418** be entirely disposed of.[FN6] Conversely, the State's reading produces inconsistent and absurd results.

FN6. The United States Supreme Court has also said final is "a case in which a judgment of conviction has been rendered,"*Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and has consistently held a final judgment includes both a final conviction and a final sentence. *See Burton*, 127 S.Ct. at 798-99. Also, Federal Rule of Criminal Procedure 32(k) defines judgment of conviction as "the plea, the jury verdict or the court's findings, the adjudication, and the sentence."

¶ 14 First, the statute's purpose is to set a time limit for when a defendant can bring a "collateral attack on a judgment and sentence." RCW 10.73.090. When the Court of Appeals issued its mandate on May 14, 2004, Skylstad had no sentence. The State's reading would require Skylstad to have collaterally attacked his sentence within one year, even though he had no sentence to attack. This incongruity would prevent a defendant from ever being able to collaterally attack his sentence if his second appeal takes longer than a year. [FN7]

FN7. In petitioner's reply brief, Skylstad points out the absurd result of this construction: "While the vast majority of resentencing hearings take place within one year from remand, some (like capital cases) do not. Thus according to the State's interpretation of the statute, if this Court reverses and remands a capital case for a second special sentencing proceeding and that proceeding does not take place within a year of the mandate, he would *never* be able to challenge his conviction in a post-conviction proceeding." Pet'r's Reply Br. at 5.

[8] ***954** ¶ 15 Second, after Skylstad's sentence was reversed, there was also no judgment for Skylstad to collaterally attack. When a court reverses a sentence it effectively vacates the judgment because the "[f]inal judgment in a criminal case means sentence." *Berman*, 302 U.S. at 212, 58 S.Ct. 164.

Without the sentence there can be no judgment. *Id.* The State's reading would mean Skylstad had to bring a collateral attack against the judgment even though there was no valid judgment. And it strains reason to suggest there can be a final judgment where there is no valid judgment.

¶ 16 And finally, the legislature broadly defines collateral attack as "any form of postconviction relief other than a direct appeal." RCW 10.73.090(2). This includes "a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment." *Id.* A defendant should not be forced to seek such relief while his direct appeal is still pending. Depending on its result, Skylstad's second appeal could have mooted issues in his PRP and vice versa. *See Bode v. Clark Equip. Co.*, 807 F.2d 879, 881 (10th Cir.1986) (stating a judgment is not final if it can be mooted by subsequent events).

[9] ¶ 17RCW 10.73.090(3)(b) says a judgment is final when the appellate court mandate *disposes* of a timely direct appeal from the conviction. Skylstad's direct appeal from his conviction cannot be disposed of until both his conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues. Therefore, because his second appeal was still pending, no final judgment was entered and the one-year limitation had not yet begun. Skylstad's PRP is not time-barred.[FN8]

> FN8. In his petition for review, Skylstad argues if we find his PRP is untimely we should equitably toll the statute of limitations. Because we find his PRP to be timely, we need not reach this argument.

***955** B. Should Skylstad's PRP Be Remanded to Superior Court?

¶ 18 Skylstad raises two new issues he claims cannot be determined solely on the record. Pet'r's Suppl. Br. at 17. Therefore, he requests we transfer his PRP to superior court for a determination on the merits under RAP 16.11.[FN9] As the rule states, this is best left to the discretion of the Court of Appeals chief judge who can consider Skylstad's PRP in its entirety and decide what issues can be determined on the merits and what issues must be transferred to superior court; it is premature for us to make ****419** such a decision. We need decide only whether Skylstad's PRP was timely.

> FN9. RAP 16.11(b) provides, "If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing."

III

CONCLUSION

¶ 19 We hold the mandate issued on May 24, 2004 was not a final judgment because it did not dispose of Skylstad's second appeal. A final judgment means both the conviction and sentence are final. Therefore, Skylstad's PRP is not untimely, and we remand to the Court of Appeals to determine the merits of Skylstad's PRP.

WE CONCUR: GERRY L. ALEXANDER, Chief Justice, TOM CHAMBERS, CHARLES W. JOHNSON and JAMES M. JOHNSON, Justices.
FAIRHURST, J. (dissenting).
¶ 20 The majority erroneously concludes a judgment is final under RCW 10.73.090(3)(b) when the appellate court issues its mandate disposing of a timely direct appeal from both the conviction and the sentence. I would hold a judgment is final under RCW 10.73.090(3)(b) when the appellate court issues its mandate disposing of a timely direct appeal from the ***956** conviction and affirm the Court of Appeals' conclusion that Scott W. Skylstad's personal restraint petition was time-barred. I respectfully dissent.

¶ 21 The court's primary goal in construing a statute is to determine and give effect to the legislature's intent. *Am. Cont'l Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004) (citing *State v. Watson*, 146 Wash.2d 947, 954, 51 P.3d 66 (2002)). We generally begin our analysis with the text of the statute. *Id.* " '[A] statute is ambiguous if it can be reasonably interpreted in more than one way.' " *Yousoufian v. Office of King County Executive*, 152 Wash.2d 421, 433, 98 P.3d 463 (2004) (quoting *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd.*, 127 Wash.2d 759, 771, 903 P.2d 953 (1995)). "When a statute is ambiguous, 'this court will resort to principles of statutory construction,

legislative history, and relevant case law to assist in interpreting it.' " *Id.* at 434,98 P.3d 463 (quoting *Watson*, 146 Wash.2d at 955, 51 P.3d 66). However, a statute's failure to define a term or terms does not necessarily render it ambiguous. *Ravenscroft v. Wash. Water Power Co.*, 136 Wash.2d 911, 920, 969 P.2d 75 (1998). "Rather, an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated." *Id.* at 920-21, 969 P.2d 75 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549 (1992)). "Courts often look to standard dictionaries to determine the ordinary meaning of words." *Id.* at 922,969 P.2d 75.

¶ 22RCW 10.73.090(1) states, "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final." RCW 10.73.090(3) states, "a judgment becomes final" when (a) "it is filed with the clerk of the trial court," (b) "an appellate court issues its mandate disposing of a timely direct appeal from the conviction," or (c) "the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." Because Skylstad filed a direct appeal of his conviction, only subsection (b) of RCW 10.73.090(3) is applicable here.

***957** ¶ 23RCW 10.73.090 does not define the words "judgment," "sentence," or "conviction." Thus, we must analyze their plain and ordinary meaning to determine if the statute is ambiguous.

¶ 24*Black's Law Dictionary* defines "judgment" as "[a] court's *final determination of the rights and obligations of the parties in a case.*" Black's Law Dictionary 858 (8th ed.2004) (emphasis added). It defines "sentence" as "[t]he judgment that a court formally pronounces *after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.*" *Id.* at 1393 (emphasis added). It defines "conviction" as "[t]he act or process of *judicially finding someone guilty of a crime;* the state of having been proved guilty." *Id.* at 358 (emphasis added).

¶ 25 It is clear that the words "judgment," "sentence," and "conviction" are not interchangeable, as the majority concedes. Majority at 417. Rather, the "judgment" is the ****420** court's formal decision or order in a case, the "sentence" is the punishment imposed on a defendant for the crime committed, and the "conviction" is the act of judicially finding a defendant guilty of committing the crime. Once we have determined the meaning of the words used in the statute, we must determine whether the statute is ambiguous and whether it requires application of the statutory interpretation canons.

¶ 26RCW 10.73.090(1) clearly allows a defendant to file a petition or motion for a collateral attack on a "judgment" and "sentence" no more than one year after the "judgment" is final. RCW 10.73.090(3)(b) clearly defines the finality of a "judgment" as the date that the appellate court issues its mandate disposing of a defendant's timely direct appeal from his or her "conviction." The majority insists that in order to give meaning to the fact that RCW 10.73.090(1) allows a defendant to file a petition or motion for a collateral attack on a sentence, RCW 10.73.090(3)(b) must mean the date the appellate court issues the "mandate that terminates review of both conviction and sentence." Majority***958** at 417-18. But there is nothing in the statute that would suggest such a requirement.

¶ 27 Indeed, RCW 10.73.090(3)(b) could not be more clear in stating that the appellate court's mandate disposing of the defendant's timely direct appeal from his or her "conviction" renders the judgment "final." "The court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately." *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997). While it is true that RCW 10.73.090(1) allows a defendant to file a petition or motion for a collateral attack on the "judgment" and "sentence," that fact alone does not require the finality of the "judgment" to be based on both the "conviction" and the "sentence" if the statute does not require it.

¶ 28 The court should not read into a statute words that are not there. If the legislature had wanted to base finality of a judgment on both the conviction and the sentence, as the majority finds, it would have said so. The legislature's purpose in enacting RCW 10.73.090 was to restrict the time for a defendant to raise a collateral attack on his or her judgment and sentence. It defined that time as when the judgment becomes final and specifically outlined what final

meant in RCW 10.73.090(3).

¶ 29 I would affirm the Court of Appeals and hold that Skylstad's collateral attack was time-barred because his judgment was final when the appellate court issued its mandate disposing of his timely direct appeal from his conviction. I respectfully dissent.

WE CONCUR: SUSAN OWENS, BARBARA A. MADSEN and BOBBE J. BRIDGE, Justices.
Wash.,2007.
In re Skylstad
160 Wash.2d 944, 162 P.3d 413

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